

## The Governance Project

### Briefing No. 2 – August 2008

## Legal Responsibilities of Directors/Charity Trustees

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### Introduction

#### Vocabulary generally used:

1. Charity – Registered as a Charity only and not a Company Limited by Guarantee (but can be both)
2. Charity Trustee – A person who governs the Charity in Trust
3. Governing Document – Deed of Trust or Memorandum and Articles of Association
4. Company Limited by Guarantee – Where the Membership of a Charitable Company has Limited Liability usually a nominal sum such as £1
5. Company Secretary – This role is essential if the Charitable Company is Limited by Guarantee. (Companies Act 2006 removes this as an absolute requirement but states that the tasks must still be carried out. However your Governing Document may say this is a requirement and will need to be amended to take advantage of the 2006 change)
6. Director – Elected Member of a Charitable Company Board, (can also be referred to as a Management Committee Member)

#### General Duties as Charity Trustees

##### Duty to Exercise Reasonable Care and Control:

Charity Trustees must carry out their duties with the care and skill which can be expected of a prudent person in the exercise of his/her personal business affairs. The acts/omissions of a Trustee are judged against this objective standard, but if a Trustee has a specific skill, ie a lawyer or an accountant, a higher level of skill will be expected from him/her in that area. Trustees must **never** let their personal views/prejudices affect their conduct as Charity Trustees.

The general duty to exercise care and skill encompasses more specific duties including:

1. To ensure the Charity's assets are applied only for its objects and not for any other purpose

2. To protect the Charity's assets, and
3. To maximise the Charity's assets

If a Charity Trustee is in breach of this duty he/she will be personally liable to the Charity. Examples include if:

1. S/he allows the Charity's assets to be used for any purpose other than its objects
2. S/he makes poor investment decisions resulting in losses
3. S/he makes unlawful payments to other Trustees
4. S/he does not act in the interest of the Charity
5. S/he engages in impermissible political activity

### **Duty not to Profit:**

Trustees are under a duty not to profit by virtue of their position as Trustees. The general rule is that Trustees must act gratuitously. This is an absolute duty and will be applied strictly. There are however, a number of exceptions:

1. If the Charity has community based objects a Trustee can enjoy the benefits of that Charity as members of the community
2. A Charity can pay for Trustee indemnity insurance, if appropriate, to protect Trustees from personal liability for acts properly undertaken in the administration of the Charity, or for acts which although amounting to breach of trust were an honest mistake and if **the governing document provides for this**
3. Trustees may claim reasonable expenses incurred in the course of carrying out their duties
4. Professional Trustees, eg lawyers/accountants can be paid for the work they do for the charity in a professional capacity, but, **only if the governing document specifically provides for this**
5. If a Charity allows Employee Trustees specific exemption must be **provided for in the governing document and Charity Commission consent must be obtained**

Only a minority of Trustees can be paid under the above exemptions. If a Trustee is to be paid under one of the above exemptions s/he must withdraw from any meetings where the terms of remuneration are discussed.

### **Charity Trustees must not place themselves in Position of Conflict:**

A Charity Trustee must be careful not to put her/himself in a position where her/his own interests or the duties s/he owes to any other organisation might conflict with the interests of the Charity.

The difficulty arises in particular in situations where the conflict is not a result of a transaction between the Trustee/Director and the Charity (where for example he/she provides services to the Charity) but where the conflict arises from other circumstances. A typical example of this would be where a Trustee of Charity A was also a Trustee of Charity B

and, as a result of being a Trustee of Charity A s/he became aware of an opportunity which would also be important for Charity B. S/he then faces the conflict as to whether to use the knowledge to assist Charity B. Companies Act 2006 says this situation is to be resolved by the Director declaring the conflict and the other Directors authorising it. Unfortunately for Charitable Companies, the Act requires that the Directors may only authorise the conflict if there is a provision in their Articles allowing them to do so. This provision is rarely found in Articles of Association<sup>1</sup>.

### **Delegation:**

Charity Trustees have ultimate responsibility for the activities of the Charity. Trustees can act by majority: they can therefore delegate amongst themselves. They can also delegate the administrative duties to staff **but not** their trust or powers.

Delegation does not mean abdication of responsibility and Trustees remain liable for the actions of those to whom responsibility has been delegated, whether they be fellow Trustees or staff. To protect themselves Trustees should:

1. Ensure the job descriptions/specifications of any employees are clear
2. If Trustees delegate amongst one another they must ensure the terms of reference are clear; and
3. Have clear and regular reporting procedures, which are enforced in practice

### **Duty to Protect the Charity's Name and LOGO:**

A Charity's name and logo are often its most valuable assets. The Charity Commission Annual report commented:

"If a Charity's name is used commercially it must be shown that the arrangement is expedient, in the interests of the Charity and on terms which are advantageous to the Charity. Any such arrangements must be precisely defined by the Charity Trustees in every detail and kept under review. They must ensure that there is no misuse of the Charity name nor any improper exploitation of its association with a commercial organisation and that the arrangements made allow them to prevent any misuse."

Trustees should explore all ways of protecting the Charity's name and logo, including:

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<sup>1</sup> "From the Spring 2008 Legal Update from the Charity Team at Russell-Cooke LLP. You can sign on to receive updates directly on the website [www.russell-cooke.co.uk](http://www.russell-cooke.co.uk). If you have any queries on these issues or for further information please contact James Sinclair Taylor on 0208 394 6480, [James.SinclairTaylor@russell-cooke.co.uk](mailto:James.SinclairTaylor@russell-cooke.co.uk) or Andrew Studd on 0208 394 6414, [Andrew.Studd@russell-cooke.co.uk](mailto:Andrew.Studd@russell-cooke.co.uk)".

1. Insisting upon licensing agreements if a third party is to be allowed to use it
2. Registering the name/logo as a trademark
3. If necessary bringing court action to stop any misuse (this may involve the necessity to prove outright ownership of the name and/or logo, such action is generally referred to 'passing off' and can be costly)
4. All documentation relating to the Charity must have 'Registered Charity' clearly shown. This includes cheques and letterheading.

### **Other Liabilities**

The different forms of legal structure a Charity could take, have a marked significance upon the extent of liability a Trustee faces.

Incorporation as a company does not however, provide the absolute protection many people think it does. Breach of trust will result in personal liability notwithstanding incorporation and includes acting outside the Charity's objects, failure to exercise reasonable care and skill and, of course dishonesty.

### **Fraudulent Trading**

If a business is carried on with an "intent to defraud creditors" or for any other fraudulent purpose anyone who is knowingly a party commits a criminal offence for which s/he can be imprisoned and/or fined. This applies whether or not the company has been, or, is in the process of being wound up.

### **Awareness**

Be aware of what your Charity is able to do under its constitution. Ensure that you are knowledgeable about the running of the organisation. Make a checklist of matters all organisations have to deal with and ensure they have been dealt with, and if they have not, make sure staff deal with them if possible. If you are in doubt, seek advice from people who are knowledgeable about the area in which decisions have to be made such as your membership body.

For further information on the content of this briefing please contact:

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